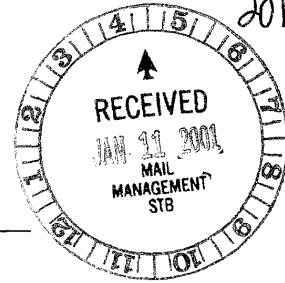


BEFORE THE
SURFACE TRANSPORTATION BOARD



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EX PARTE NO. 582 (Sub-No. 1)

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MAJOR RAIL CONSOLIDATION PROCEDURES

REBUTTAL COMMENTS OF
THE ASSOCIATION OF AMERICAN RAILROADS

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Dated: January 11, 2001

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**REBUTTAL COMMENTS OF
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The Association of American Railroads has carefully reviewed the reply comments submitted in response to the Board's October 3, 2000 Notice of Proposed Rulemaking (NOPR).¹ In AAR's view, those reply comments do not materially alter the state of the record of this rulemaking proceeding from that which existed following submission of opening comments. The commenting parties, including AAR, generally continue to express broad support for the Board's proposed Service Assurance Plans and the commitment in the proposed rules to careful scrutiny of service issues during the oversight process. As was the case with the opening comments, however, there is nothing approaching consensus on the Board's proposal to restructure rail markets in merger cases through mandatory, non-remedial competitive conditions. AAR strenuously opposes this proposal. Some shipper interests tend to treat it as a springboard to more extreme proposals.

For a few shippers, the Board's proposal for market restructuring in the merger context provides the occasion to express a fundamental hostility toward rail mergers. These parties are

¹ The Canadian National Railway Company is not a participant in these Rebuttal Comments.

unwilling to acknowledge that future rail mergers could ever generate public benefits. That position simply cannot be credited. There have been past mergers that have generated substantial public benefits, including instances of more vigorous competition flowing from voluntary initiatives of the merger applicants. Future merger proposals may carry the promise of substantial public benefits and any such proposals should be evaluated on the basis of the record in each proceeding. The suggestion of these parties that merger applicants should be required to pay substantial penalties (i.e. sacrifice private benefits) as the price for merger approval is contrary to the public interest because it could deter rail mergers that promise public benefits.

Other shipper interests are using this proceeding as an occasion to pursue their own agenda for broad reregulation of the railroad industry. These parties advocate an intrusive and unprecedented role for the Board in restructuring rail markets. Some of the parties openly acknowledge that their objective is to create more pervasive regulation of railroad markets. Others claim that they advocate greater reliance on market forces, but their actual proposals make clear that they would anticipate the Board becoming far more active in regulating railroad conduct and the market place.

The arguments for broad market restructuring are out of place in this rulemaking proceeding. The Board has already stated in its NOPR that it would be improper to impose conditions on a rail merger that "would in essence represent a complete overhaul of the existing regulatory framework." NOPR at 16. It would be similarly improper to adopt rules in this proceeding that contemplated such a far reaching result.

Various commenting parties accuse AAR and its members of resisting any change to the existing approach to merger review. That is plainly not the case. AAR acknowledges that certain changes in the Board's merger rules are appropriate where the rules address the effects of

rail mergers. AAR generally supports the Board's proposal for Service Assurance Plans, Service Councils and careful scrutiny of service issues after a merger occurs. These proposals are justified because the service disruptions associated with several recent rail mergers need to be avoided in the future.

AAR also supports the Board's general concept for more detailed market analyses so that the Board can evaluate fully the possible competitive effects of a proposed merger. AAR recognizes that it may be appropriate to consider in some context cumulative impacts and crossover effects, recognizing the limits on any party's ability to predict such impacts and effects with precision. AAR supports the Board's emphasis on negotiated resolution of service assurance and environmental issues. Some of AAR's members take positions in their individual comments that support other aspects of the Board's NOPR or propose modifications.

AAR does not believe that the Board's merger rules should address issues unrelated to mergers. In particular, AAR believes that the Board's proposals for mandatory, non-remedial competitive conditions are inconsistent with the controlling statute and contrary to sound public policy. The Board's proposal, if implemented, would also complicate and delay merger review proceedings that are already cumbersome and unduly protracted. The Board's merger rules should ensure a thorough case-by-case examination of particular merger proposals to determine whether any adverse effects on competition are likely and whether remedies for those adverse effects can be fashioned. The Board should encourage market-based, private sector initiatives that result in more vigorous competition, but it should not seek to restructure railroad markets by imposing conditions that are unrelated to any merger harms as a price for approval of a merger.

I. Competition Issues

The proposal in the Board's NOPR that most concerns AAR and its member railroads is that merger applicants would be required to restructure rail markets even though market considerations do not call for such restructuring and it is not needed to remedy any competitive harm created by the merger. AAR explained in its opening comments why this proposal would be inconsistent with the statutory public interest standard and contrary to sound administrative decisionmaking.

Many shippers and shipper groups were also critical of this aspect of the Board's proposal in their opening comments, and their reply comments reiterate that criticism. A few parties address AAR's statutory and public policy concerns, but they fail to show how mandatory, non-remedial conditions could be justified under the existing statute or why it would be appropriate to subject merging railroads to conditions that do not address merger-specific effects. In fact, the reply statements confirm AAR's earlier-stated concern that shippers would view the Board's proposal for mandatory, non-remedial conditions as a vehicle for pressing an agenda for broad regulatory change, to the detriment of the entire railroad community.

The Presumption of Unremediable Harm

AAR explained in its opening comments that one reason why the Board's proposal for mandatory, non-remedial conditions is flawed is that it is based on presumptions about the competitive effects and efficiencies of future mergers that are not supported by a factual record. The presumption on which the Board appears most heavily to rely is that future mergers will bring about anticompetitive effects that are unremediable, thus requiring a contrived restructuring of the market to offset the adverse effects. The few commenting parties that discussed this presumption of unremediable harm fail to identify any factual support for it.

These commenting parties maintain that past mergers have reduced competition and generated no appreciable benefits; they argue that it is appropriate to assume that future mergers will have the same net adverse effects.² Some of them claim generally that competition has declined since 1980 because the number of major freight railroads has been reduced.³ This simplistic assertion ignores the competitive dynamics of railroad markets, including the possibility of increased competition flowing from efficiency gains and increased economies of scope and density. It also disregards the recent findings of the Board's Office of Economics about continuing rail rate declines and its conclusion that "on the whole, the railroad industry clearly operates in a competitive environment."⁴

Other commenters assert that the Board's existing approach to merger review, which seeks to identify particular harms and develop specific remedies for those harms, is inherently flawed. As one commenting party stated: "approving mergers subject to narrowly tailored conditions intended to offset specific, identified, competitive harms – results in a net reduction in competition, because not all the competitive harms are identified."⁵ The parties expressing this view have produced no evidence of specific competitive harms that were caused by, but overlooked in, any prior merger. Given the widespread and vigorous participation in prior

² See Reply Comments of the National Grain and Feed Association ("NGFA") at 3 ("mergers [have] produc[ed] few, if any, palpable benefits for shippers and many distinct problems"); Reply Comments of the National Industrial Transportation League ("NITL") at 21 ("past mergers have resulted in a diminution of rail to rail competition, and future mergers are even more likely to result in a lessening of such competition").

³ See, e.g., Opening Comments of PPL Generation, LLC ("PPL") at 2.

⁴ *Rail Rates Continue Multi-Year Decline*, STB Office of Economics, Environmental Analysis, and Administration (December 2000).

⁵ Reply Comments of Committee to Improve American Coal Transportation ("IMPACT") at 32.

merger cases by parties (many of whom are commenters here) who had every incentive to identify competitive harm, the failure to specify such supposed overlooked harms is particularly telling.

Two other presumptions underlie the Board's proposal to require mandatory, non-remedial conditions. First, the Board assumes that permanent non-remedial competitive conditions will be needed to offset likely harms stemming from transitory service disruptions. Few commenting parties address this presumption. Where the presumption is considered by the commenting parties, the only justification offered for it is that service disruptions are likely in the future because they have occurred in past mergers.⁶ These parties ignore the significant changes that the Board is proposing in this rulemaking proceeding that are intended specifically to minimize or eliminate the chance of future service disruptions. They also ignore the possibility that a requirement of structural changes in rail-to-rail competition could be counterproductive if the mandatory conditions have the effect of compounding service disruptions.⁷ Significantly, these parties also gloss over the fact that permanent structural change is an inappropriate means of addressing the adverse effects of any temporary service disruptions.

The Board's third and final presumption is that future mergers will not yield efficiency gains which might offset harms caused by a merger. Again, few commenting parties address this presumption except to repeat the Board's assertion that the efficiency gains stemming from the elimination of duplicative or unproductive infrastructure, which were associated with many past

⁶ See Reply Comments of NITL at 25.

⁷ As the Department of Transportation noted in its opening comments, the imposition of competitive conditions could "inadvertently exacerbate merger implementation difficulties through increased congestion." Comments of the United States Department of Transportation ("USDOT") at 5.

mergers, are unlikely to result from future mergers.⁸ But those are not the only efficiency gains that mergers can produce. The commenting parties do not even consider the possibility addressed in AAR's opening comments that future mergers could yield efficiencies in the form of cost savings or network improvements that can be passed along to shippers through lower rates, improved service and expanded service offerings. Whether or not the Board is correct that efficiency gains associated with the elimination of duplicative infrastructure will not recur, it is unreasonable to assume that future mergers will produce no efficiency gains of any type.

AAR believes that the presumptions articulated by the Board in its NOPR are an impermissible substitute for careful factual analysis of the record in individual merger proceedings. There is certainly no factual record in this rulemaking proceeding that would warrant the adoption of such presumptions. In lieu of presumptions, the Board should conduct a case-by-case examination of the facts of particular merger proposals to determine whether any adverse competitive effects are likely and to identify remedies specifically tailored to any such adverse effects.

Lack of Authority to Require Mandatory, Non-Remedial Conditions

AAR also objects to the Board's proposal for mandatory, non-remedial competitive conditions as unprecedented and inconsistent with the principles of market-based regulation in the Staggers Act. Some shippers dispute AAR's claim that the imposition of non-remedial conditions would be unprecedented. One group of coal shippers asserts that "[c]ompetition-enhancing conditions are frequently imposed on mega-mergers in other industries," citing the conditions recently imposed by the Federal Trade Commission (FTC) on the merger of AOL and Time-Warner. In fact, the FTC's approach in that merger review is instructive on the proper role

⁸ See Reply Comments of NITL at 24; Reply Comments of IMPACT at 30.

of competition policy in a merger review and supports AAR's position that conditions should be tailored to remedy specific harms created by a particular merger.

The FTC concluded that the unconditioned merger of AOL and Time-Warner would adversely affect competition for broadband internet services only after a detailed and extensive review of the relevant markets and the specific ways in which the proposed merger would affect those markets. The decision to impose conditions was based on the FTC's factual analysis, not on presumptions about merger effects or on a general desire to advance some industrial policy. Equally important, the FTC's conditions, which included a requirement that the new firm make available its cable system to competing internet service providers, were expressly fashioned to remedy the specific anticompetitive effects of the merger that the FTC concluded were likely. As the FTC announced in its press release, "The Federal Trade Commission has accepted a proposed consent order *that would remedy the likely anticompetitive effects of the proposed merger.*"⁹ Notwithstanding the vast size and readily apparent public policy implications of the AOL/Time Warner transaction, the FTC was careful to limit its intervention to addressing the specific anticompetitive effects of the proposal.

The FTC's approach is precisely the approach to reviewing the competitive effects of mergers that the Board and the ICC have followed since the Staggers Act, and it is the approach that should be maintained in the Board's new merger rules. The Board and the ICC, like the FTC, have regularly examined the likely effects of a particular transaction based on a detailed review of the factual record in individual cases. If that review indicated that competition could be adversely affected in particular areas, the agencies considered conditions that would remedy

⁹ FTC Press Release, December 14, 2000, *FTC Approves AOL/Time Warner Merger with Conditions*.

those anticompetitive effects. Access conditions such as trackage rights have been imposed only to the extent necessary to remedy specific anticompetitive effects. The antitrust agencies do not use their merger review authority to accommodate the industrial planning goals of opposing parties, nor should the Board.¹⁰

AAR explained in its opening comments that the statutory public interest standard that governs the Board's oversight of rail mergers does not entail the concept of mandatory, non-remedial competition that the Board is proposing to engraft upon its merger policy. A number of shippers dispute AAR's position, arguing that the governing statute does not specifically state that the Board is restricted to addressing the adverse effects of a merger.¹¹ In fact, 49 U.S.C. §11324(c) states that "trackage rights and related conditions [are] imposed to alleviate anticompetitive effects of the transaction. . . ."

Moreover, the Board and the ICC before it have recognized that the regulatory scheme created by the Staggers Act did not envision the Board as an industrial planning agency with the power to dictate the evolution of the railroad industry. Under the existing statute, the

¹⁰ The American Chemistry Council and the American Plastics Council assert that jurisdiction for rail merger review should be shifted to the antitrust agencies. The jurisdictional issue is clearly beyond the scope of this proceeding. In any event, it is clear that the standards applied by the antitrust agencies do not contemplate the use of merger review authority to accomplish non-merger related regulatory objectives.

The Edison Electric Institute points to the practice of the Federal Energy Regulatory Commission (FERC) as precedent for the use of non-remedial merger conditions to advance an open access regulatory agenda. Reply Comments of Edison Electric Institute ("EEI") at 12. In fact, FERC determined that it was *not* appropriate to implement new rules governing access to regulated transmission facilities through merger proceedings. See *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 60 Fed. Reg. 17662, 17664, 17671 (April 7, 1995).

¹¹ See, e.g., Reply Comments of The Dow Chemical Company ("Dow") at 12-14; Reply Comments of NITL at 18.

competitive structure of the rail network is determined by the judgment of market participants and not by regulators. The ICC "properly rejected the notion that the Staggers Act is a mandate for [the Commission] to compel restructuring of the rail industry to create more rail-to-rail competition."¹² The existing statute gives the Board ample authority to investigate the likely competitive effects of a merger and to fashion remedies that address any adverse effects. The Board lacks authority to go further.

The Lack of Specificity in the Board's Proposal for Non-Remedial Conditions

Virtually all commenting parties complain that the Board's proposal for mandatory, non-remedial conditions lacks sufficient detail. As AAR explained in its opening comments, the rail community needs certainty in rules governing transactions that are as large, time-consuming and complex as mergers. The Board's proposal for mandatory, non-remedial conditions leaves the rail community with insufficient guidance as to what will be required to obtain Board approval of a transaction. Since the required conditions are unrelated to the effects of a merger, there can be no objective standard for judging the adequacy of the proposed conditions or predicting in advance how the Board will evaluate the merger applicants' proposals. This uncertainty could discourage future mergers that would advance the public interest, and it is therefore another reason why the Board should abandon its proposal for mandatory, non-remedial conditions.

Many shippers and shipper groups urge the Board to deal with the uncertainties in the Board's proposal by imposing specific, pro-forma conditions on all merger applicants, regardless of the circumstances of a particular merger.¹³ This would clearly be inappropriate. One likely

¹² *Intramodal Rail Competition – Proportional Rates*, Ex Parte No. 445 (Sub-No.2), slip op. at 4 (served April 17, 1990).

¹³ See AAR Reply Comments at 4-5.

consequence of such an approach would be to discourage or prevent future mergers from occurring at all. While this result would clearly please a number of commenting parties, it would not be consistent with the statutory public interest standard for the Board to adopt rules that would prevent mergers that could improve service, enhance competition or bring other public benefits.

The shippers' proposals for pro-forma conditions suffer from other flaws. As the Department of Transportation stated in its opening comments, the arbitrary imposition of broad competitive conditions could have adverse effects in an "industry such as the rail industry, which is characterized by decreasing costs and [which] requires differential pricing to recover full costs."¹⁴ This concern is well founded and was shared by the Board's predecessor. In the proposed SF/SP merger, the ICC rejected certain competitive conditions sought by shippers that were not directly related to the competitive harms created by the merger because those proposed conditions would "broadly restructure the competitive balance among railroads with unpredictable effects."¹⁵

The broad, pro-forma conditions proposed by some shippers are also unrelated to the effects of rail mergers, and therefore are an inappropriate subject of the Board's rules governing mergers. These parties seek to restructure railroad markets for their own perceived short term benefit through new regulation, not to address the effects of future mergers. And while many of these commenting parties claim to be proponents of competitive markets, their proposed conditions in fact would portend a return to highly intrusive regulation of railroad conduct.

¹⁴ Comments of the USDOT at 4.

¹⁵ *Santa Fe Southern Pacific Corp. – Control – Southern Pacific Transportation Company*, 2 I.C.C.2d. 709, 827 (1986).

Some shippers openly acknowledge that their ultimate objective is fundamentally to revise the existing regulatory structure in areas unrelated to mergers.¹⁶ The Board has already recognized that this rulemaking is not the place to address this broad reregulation agenda.

Expansion of Merger Conditions To Non-Merging Railroads

Some commenting parties urge the Board to impose broad pro-forma conditions on both merging *and* non-merging railroads. These parties express the concern that the imposition of non-remedial conditions on merging railroads alone would create a distortion in railroad markets. As one shipper described it, the imposition of competitive conditions unrelated to merger effects "would create a serious disparity between the competitive conditions facing merging as opposed to non-merging carriers, to the detriment of both merging carriers and the shipping public."¹⁷ To address this concern, these shippers urge the Board to extend any competitive conditions imposed on merging carriers to non-merging carriers.¹⁸

The governing statute clearly does not permit this use of the conditioning authority and it would be irresponsible public policy to use it in the manner advocated by these commenters. The statute authorizes the Board to impose conditions on merger applicants, not on non-merging railroads. Nor would it make any sense for the Board to use its conditioning authority in this manner. It would be wholly inappropriate to require non-merging railroads to alter their commercial behavior in order to advance a competitor's merger plans, particularly when the non-

¹⁶ See, e.g., Reply Comments of Dow at 7.

¹⁷ Reply Comments of NITL at 3; *see also* Reply Comments of Certain Coal Shippers at 6.

¹⁸ Opening Comments of NITL at 17.

merging railroads have no prospect of gaining any of the merger-related benefits such as cost savings that the merger applicants can expect to achieve.

Some shippers claim that the Board should address their concerns about a disparity in competitive conditions facing merging and non-merging railroads by expanding the scope of this merger rulemaking proceeding to develop "new pro-competitive rules that apply to the entire industry irrespective of a merger."¹⁹ But the Board has already declared that this proceeding is addressed to changes in its merger rules and that "it would be improper for us to impose additional conditions that, if put into effect, would in essence represent a complete overhaul of the existing regulatory framework." NOPR at 16.

Treatment of Intermodal Competition

Many parties would have the Board disregard or discount the benefits of any increased intermodal competition from future mergers. These parties urge the Board to make it clear that it would deny approval for a merger that does not "increase [rail-to-rail] competition where it is currently inadequate,"²⁰ even if the merger promises enhanced intermodal competition and otherwise would produce no adverse effects. Their position, essentially, is that the Board should not give weight to the benefits of enhanced intermodal competition in assessing the balance of merger-related benefits and harms that is contemplated by the statutory public interest standard.

It would be inconsistent with the statutory public interest standard for the Board not to give full credit to the benefits of enhanced intermodal competition in reviewing an application for merger approval. The statute does not make a distinction between enhanced intramodal competition that flows from any efficiencies or service improvements that a merger might offer,

¹⁹ Reply Comments of Consumers United for Rail Equity ("CURE") at 6.

²⁰ Reply Comments of IMPACT at 12.

enhanced intramodal competition resulting from the voluntary undertakings of merger applicants, and enhanced intermodal competition. Competitive enhancements, in any form, should be considered in determining whether a merger is in the public interest.

In addition, as the Board is aware, past mergers have been driven in large part by the desire of the merging railroads to compete more effectively with other transportation modes, and the public has benefited from this increased intermodal competition. These benefits could become even more important as constraints on the capacity of the Nation's non-railroad transportation infrastructure increase. It would be unreasonable for the Board to ignore these benefits at the very time they are becoming increasingly important in transportation markets.

II. Service Assurance

AAR and most other commenting parties support the Board's proposals for Service Assurance Plans, Service Councils and careful oversight of service issues after a merger has been implemented. AAR believes that it is appropriate for the Board to focus attention on rail service issues and to modify its existing merger rules in ways that will minimize or eliminate the possibility that future mergers will produce transitional service disruptions of the type that have been experienced in some recent mergers. AAR believes the Board's proposals in these areas are positive steps forward.

However, the Board needs to implement these proposals with a recognition that railroads have limited ability to predict and control future events. Thus, the Board can only expect service assurance plans to describe future efficiencies and service benefits with reasonable precision. AAR urges the Board to clarify that the degree of precision it will expect in the Service Assurance Plans will be evaluated in light of the inherent uncertainty about future conditions in

railroad markets and the dynamic character of those markets. The Board should also make it clear that it will not lock the merging carriers into the operations described in their plans.

AAR supports the Board's proposal that the parties be encouraged to negotiate service assurance terms to the greatest extent possible. However, the Board should not suggest in its proposed rules that merger applicants will be penalized if they are unable to reach negotiated service assurances. This would be counterproductive, since it would encourage shippers and connecting carriers to make unreasonable demands in the hope that the merger applicants would accept even unreasonable proposals rather than face the penalties that could be imposed, including the possible denial of the merger application, if a negotiated agreement is not reached.

The Board should also reject the proposal of some shippers that financial penalties be imposed on the merger applicants if the merger fails to achieve the service levels described by the merger applicants in their service plans. Merger applicants already have financial and commercial incentives to avoid service disruptions and to achieve service improvements. As the Board is aware, most of the customers of freight railroads have competitive alternatives, so a railroad already faces serious commercial penalties if it cannot meet the service expectations of those customers. In addition, the costs and lost revenues that result from service disruptions provide an incentive for merging railroads to avoid them.

III. Cumulative Impacts and Crossover Effects

AAR understands the impetus behind the Board's proposal that merger applicants submit information about the likely future structure of the North American railroad market in the event of future rail mergers, although AAR does not support the specific proposal in the NOPR. While AAR's members advocate different approaches for the consideration of this issue, they agree that the Board's proposal calls for undue speculation. The Board cannot reasonably expect merger

applicants to predict the response of other railroads with precision. AAR is concerned that the Board's proposal reflects an unrealistic expectation as to the type of information or level of detail that merger applicants could include in materials supporting an application.

Several commenting parties challenge AAR's claim that it would be difficult to predict downstream or crossover effects with any precision, noting that there is a relatively limited number of scenarios that would need to be addressed. Even if the number of scenarios is limited, it is not possible to predict how future transactions will be structured, where the downstream merging firms would propose to redirect traffic, or numerous other characteristics of the downstream transaction that would need to be considered in order to present a quantitative analysis of downstream effects. It is one thing for a merger applicant to describe in general terms the possible contours of future mergers, but it is quite another to expect merger applicants to present a quantitative analysis of public benefits in light of future transactions, as the Board proposes.

AAR also objects to the Board's proposal for "springing conditions" to take effect in the event of specific future mergers. Such conditions could well be inapplicable or irrelevant to the issues raised by the future merger. Moreover, conditions that are not tailored to address particular circumstances risk creating harms of their own. It would not be sound public policy to require merger applicants to propose contingent conditions based on speculation about the future.

IV. Class II and III Railroads

AAR supports the Board's call for merger applicants to assess the impact of a proposed transaction on short line and regional railroads to the same extent as the impacts on any other potentially affected party are assessed. AAR views these railroads as partners in meeting the

public's shipping needs and it believes that the impact of a future merger on these carriers is an issue which can be examined by the Board in a merger review proceeding.

AAR does not believe that the Board should use this rulemaking proceeding to address commercial issues involving Class II and III railroads in areas that are unrelated to the effects of future mergers on those railroads.²¹ AAR has been engaged in serious discussions with the Nation's short-line railroads over a variety of commercial issues, and that process has already resulted in a comprehensive Rail Industry Agreement which addresses several matters of concern to those railroads. Discussions between AAR and the American Short Line and Regional Railroad Association are continuing, and the Board should not interfere with those negotiations by giving consideration in this proceeding to commercial issues that are unrelated to the effects of future mergers.

In other areas, such as the negotiation of service assurances, Class II and III railroads should not receive special treatment. The Board's proposal for Service Assurance Plans already calls for merger applicants to address the circumstances of Class II and III railroads. There is no need for the Board to establish in this proceeding specific conditions or standards that those plans must meet in their treatment of Class II and III railroads. If the plans submitted by merger applicants are inadequate, the Board can address that matter in the merger proceeding.

²¹ Kansas City Southern Railway Company has favored disclosure and justification of certain "paper barriers" in the context of merger proceedings.

V. Other Issues

A. Acquisition Premium

There is no reason for the Board to address the treatment of any "acquisition premium" associated with future mergers. Financial issues in future mergers that bear upon the public interest should be examined on a case-by-case basis, which is the Board's current practice.

B. Commuter Interests

While AAR believes that the interests of commuter agencies should be addressed by merger applicants, special treatment of those agencies would not be appropriate. In particular, the Board should not adopt proposals by commuter agencies that call for expanded access by commuter lines to the freight rail network of merging carriers, or that would require merging carriers to make specific improvements in the railroad infrastructure for the benefit of commuter railroads.

C. Environmental Issues

AAR supports the Board's proposed rule which "encourage[s] negotiated agreements" to resolve environmental issues. However, AAR believes the Board should make it clear that those negotiated settlements must involve parties, such as local governments, that have the legal capacity to enter into agreements. AAR also opposes the suggestion by the Department of Transportation that the Board should try to catalogue the rights of communities that would be parties to the negotiation of environmental settlements. Finally, AAR urges the Board to clarify that in the merger review process it will only consider environmental and safety issues that arise from the proposed merger, and that in the merger oversight process it will not impose new conditions on the merged carrier in response to post-merger changes that stem from natural fluctuations in railroad market conditions.

Respectfully submitted,

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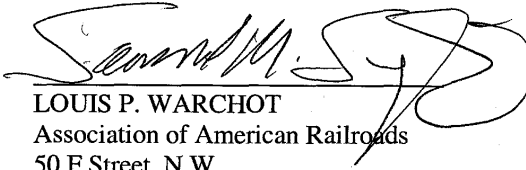
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January 11, 2001

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January, 2001, a true and correct copy of the foregoing Rebuttal Comments was served on all Parties of Record by first class mail:



Anthony J. LaRocca